Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1438

ASSOCIATED ELECTRIC COOPERATIVE, INC., *Petitioner,*

v.

ROGERS C. B. MORTON, individually and as SECRETARY OF THE INTERIOR, and PETER C. KING, individually and as ADMINISTRATOR OF THE SOUTHWESTERN POWER ADMINISTRATION, UNITED STATES OF AMERICA, *Intervening Defendant*, JOHN N. NASSIKAS, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 15, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement 5

Reasons for Allowance of the Writ 15

I. The unprecedented decision below, finding authority in the Secretary to unilaterally reduce, without compensation, the government's contractual obligations to pay for the "wheeling" of its power over transmission lines owned by others, is without statutory jusification, and, unless reversed, will make hazardous the continued utilization of this congressionally directed alternative to construction of transmission lines at federal expense. 15

II. A dangerous and fallacious precedent is set by the holding that the Secretary of the Interior may reverse a congressional policy decision, imposing detailed conditions on the expenditure of appropriated funds. These conditions required the Secretary to effectuate the congressional "postage stamp rate" policy by including in his power contracts specific provisions which he would now abrogate. 18

III. The decision below denies that the Secretary of the Interior and the Federal Power Commission are under a constitutional duty to afford due process to parties to government contracts whose rights they would reduce or cancel. If due process is required in such cases, to any degree, the

Page

decision of the court of appeals must be reversed, because the Secretary and the Commission did not grant any at all, and denied their responsibility to do so. 23

Conclusion 25

Attachment "A"

Appendix (Bound separately)

CITATIONS

STATUTES:

Bonneville Project Act, 16 U.S.C.A. 838g 6, 24
Continuing Fund Statute, 16 U.S.C. 825s-1 .....2, 4, 5, 6, 7
Flood Control Act of 1944, 16 U.S.C. 825s 2, 3, 4, 6, 12, 14, 21, 22, 24
Fort Peck Act, 16 U.S.C. 833 *et seq.* 6, 24
The Keating Amendment, 65 Stat. 255 7
Public Works Appropriations Act for F.Y. 1964, P.L. 88-251, U.S. Code Cong. & Ad. News 591 (1963) .. 11
Reclamation Project Act of 1939, 43 U.S.C. 485h(c) ...6, 24

COURT CASES:

Associated Electric Cooperative v. *Morton, et al.*, 507 F.2d 1167 (D.C. Cir. 1974) 1, 15
Brooks v. *Dewar*, 313 U.S. 354 (1941) 20
Burke v. *Southern Pac. R.R. Co.*, 234 U.S. 669, 679-80 (1914) 23
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 24
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 24
FPC v. *Texaco*, 417 U.S. 380 (1974) 24
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275, 293 (1958) 20

Page

Kansas City Power & Light Co. v. *McKay, et al.*, 115 F.Supp. 402 (1953), *vacated for lack of standing*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955) 18
Lynch v. *United States*, 292 U.S. 571 (1934) 23
Northern California Power Agency, et al. v. *Morton, et al.*, C.A. No. 74-617 (D.D.C. Feb. 14, 1975) 24
United States v. *Northern Pac. Ry. Co.*, 256 U.S. 51 (1921) 23
United States Dep't of the Interior, Bonneville Power Administration, Docket No. E-8978, — F.P.C. — (Dec. 19, 1974) 24

MISCELLANEOUS:

95 CONG. REC. 12023-36 (1949) 7, 8
96 CONG. REC. 17095-17100 (1959) 7
97 CONG. REC. 7864-68; 10207-10 (1951) 8
Hearings of the House Comm. on Appropriations on Public Works Appropriations for F. Y. 1964, 88th Cong., 1st Sess., pt. 3 at 699-700 (1963) 11
Hearings on Public Works Appropriations for 1961 Before the Subcomm. on Appropriations, 86th Cong., 2d Sess., pt. 2 at 577 (1960) 17
Hearings on Public Works Appropriations for F.Y. 1963 Before a Subcomm. of the House Comm. on Appropriations, 87th Cong., 2d Sess., pt. 3 at 815 (1962) 9, 11
Hearings on the Interior Dep't Appropriations Bill for 1964 Before a Subcomm. of the Senate Comm. on Appropriations, 88th Cong., 1st Sess., at 143 (1963) 11
H.R. REP. No. 747, 84th Cong., 1st Sess. 5-6 (1955) ... 18
H.R. REP. No. 1085, 84th Cong., 1st Sess. (1955) 19
H.R. REP. No. 93-1375, 93d Cong., 2d Sess. 4 (1974), 1974 U.S. CODE CONG. & AD. NEWS 5813 7
Potamkin, *Public Power and the Federal Government*, 30 NEB. L. REV. 375, 384-89 (1951) 7

	Page
S. Doc. No. 21, 75th Cong., 1st Sess. 2-4 (1937)	19
S. Rep. No. 1672, 89th Cong., 2d Sess. 39-40 (1966) ...7,	11
1973 Southeastern Power Administration Ann. Rep. 1, 8-10	6
1974 Southwestern Power Administration Ann. Rep. 2, 19	6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Associated Electric Cooperative, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 507 F.2d 1167 (D.C. Cir. 1974). The order of the United States District Court for the District of Columbia, granting petitioner's motion for summary

judgment, is unreported and appears in the Appendix at 23a. The principal orders of the Federal Power Commission (App. 25a-33a) are reported at 43 F.P.C. 804 (1970).

JURISDICTION

The judgment of the court of appeals (App. 1a) was entered on November 18, 1974. A timely petition for rehearing was denied on December 16, 1974 (App. 22a). On March 12, 1975, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including May 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

This case brings before the Supreme Court for the first time the extent of the authority of the Secretary of the Interior under Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which controls the sale and transmission of all power generated at dams under the control of the Secretary of the Army.

Three issues of construction of that Act, and its supplement, the Continuing Fund Statute, 16 U.S.C. 825s-1, are involved:

1. Whether the statutory authority of the Secretary of the Interior to revise the rates at which the United States sells electricity includes authority to unilaterally reduce the compensation that the United States has contracted to pay for use of transmission lines of another, in lieu of constructing its own lines.

2. Whether the Secretary of the Interior has statutory authority to reverse, by administrative action, the

decision of the Congress that electricity generated at federal hydroelectric power plants should be transmitted and sold at uniform "postage stamp rates" to all consumers receiving similar classes of service regardless of whether the power is transmitted to them (1) over lines constructed by the United States, or (2) over lines the use of which has been acquired by the United States under rental or "wheeling" agreements.

3. As for due process, the issues are:

(a) The extent to which the Secretary of the Interior, in the exercise of asserted authority to unilaterally change the terms of a contract, is obliged to afford due process to parties to such contracts.

(b) The extent to which the Federal Power Commission, in the exercise of asserted authority to review such action by the Secretary, is obliged to afford due process to parties to a contract thus unilaterally altered.

(c) If the action of the Secretary in this case is deemed to be "ratemaking," the extent of due process required.

STATUTES INVOLVED

Section 5 of the Flood Control Act of 1944, 16 U.S.C 825s, provides:

> "Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effec-

tive upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts."

The Continuing Fund Statute, 16 U.S.C. 825s-1, provides:

> "All receipts from the transmission and sale of electric power and energy under the provisions of section 825s of this title, generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund established; and said fund

> of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies: *Provided,* That expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts as may be approved annually in appropriation Acts."

STATEMENT

This suit would enjoin the Secretary of the Interior from extinguishing his admitted contractual obligation [1] to pay $2,647,100 annually for the use of certain transmission lines, by the device of superimposing,

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[1] The obligation, stated in a 1962 contract between Southwestern Power Administration (SPA) and the Petitioner (Art. V, Sec. 1(e), Ex. P-8, R. Vol. II, 196-97):

> "(e) It is anticipated by the parties hereto that by June 1, 1997, all loans made to the Federated Cooperatives by the Rural Electrification Administration and utilized by the Federated Cooperatives to construct the 'Associated 161 Kv System' set forth in Exhibit '2' will be fully repaid, it being the intention of the parties hereto that the annual credit to Associated shall continue to be made in amounts computed under Subsection (a) and (b) of this Section 1, until such REA loans have been fully repaid."

The defendants' admission (para. 20(2), R. Vol. I, 70-71):

> "They admit that subsection 1(e) of Article V of the SPA-Associated contract states that it is the intention of the parties that the annual credit to plaintiff in the full amount stated in the contract shall continue to be made until termination of the contract. . . ."

unilaterally, a "transmission service charge" in precisely the same amount, $2,647,100 annually, upon his sales of electricity to the rural electric cooperatives which own these lines. No such charge, in any amount, would be imposed upon the utilities or federal agencies which receive government power over these lines. The Secretary asserts that he is authorized by Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, to do this.

The Secretary of the Interior receives from the Secretary of the Army electricity generated at reservoirs under the latter's control, and transmits and sells this to public bodies, cooperatives, private companies, and, in some cases, federal installations.[2]

Section 5 authorizes the Secretary, from funds appropriated by Congress, to transmit and dispose of such hydroelectric power and energy by either (1) constructing transmission lines, or (2) by acquiring such lines, by "purchase or other agreement," including rental or wheeling (transmission) agreements.[3]

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[2] At present, disposition of power generated at 37 projects aggregating 3.9 million kw of capacity, in 16 States, is controlled by Section 5 of the Flood Control Act of 1944. 1974 SOUTHWESTERN POWER ADMINISTRATION ANN. REP. 2, 19; 1973 SOUTHEASTERN POWER ADMINISTRATION ANN. REP. 1, 8-10. Sister statutes, the Bonneville Project Act, 16 U.S.C.A. 838g, the Fort Peck Act, 16 U.S.C. 833 *et seq.*, and the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), contain provisions comparable to the Flood Control Act of 1944, authorizing the Secretary to transmit, or contract for transmission of, power generated at government power plants, and sell power thus delivered.

[3] A supplementary act, the Continuing Fund Statute, 16 U.S.C. 825s-1, enacted particularly to provide funding for the transmission agreements involved in this case, authorizes use of appropriated funds to pay rentals for the lines involved here.

Congress, in considering appropriation bills after enactment of the 1944 act, made a series of policy decisions declining to appropriate funds for construction of transmission lines, if wheeling agreements were attainable. This policy has continued until the present day.[4] It is placed in jeopardy by the Secretary's actions here, for reasons that we explain in Part I of the argument.

Congress also early established a policy of "postage stamp rates," that is, that rural customers of federal power projects, situated at a distance from government power plants, should pay no more for electricity than those located closer to the points of generation. This policy, too, is at hazard here, as pointed out in Part II of the argument.

In the present case, in 1950, Congress, having refused appropriations to construct transmission lines to deliver electricity from government power plants to rural electric cooperatives and other preference customers in Missouri, approved an alternate plan whereby such power would be transmitted over non-government lines to these customers, and delivered to them at their load centers at the basic SPA "postage stamp" rate, as though the lines had been constructed at government

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[4] For all Interior Department agencies marketing federal power, Congress has repeatedly directed that wheeling contracts are preferable to building transmission lines with appropriated funds. *E.g.*, 95 CONG. REC. 12023-36 (1949) (Senators Kerr, Johnson, Hayden, Thomas, and Fulbright) S. REP. No. 1672, 89th Cong., 2d Sess. 39-40 (1966) (Southwestern Power Administration); the Keating Amendment, 65 Stat. 255, reenacted in all Bureau of Reclamation appropriation acts since 1952; 96 CONG. REC. 17095-17100 (1959) (Southeastern Power Administration); H. R. REP. No. 93-1375, 93d Cong., 2d Sess. 4 (1974), 1974 U. S. CODE CONG. & AD. NEWS 5813 (Bonneville Power Administration); Potamkin, *Public Power and the Federal Government*, 30 NEB. L. REV. 375, 384-89 (1951).

expense. To bring such lines into existence, Congress approved the Secretary's proposal that (1) the rural electric cooperatives would borrow money from the Rural Electrification Administration (REA) to construct the lines desired by the Secretary; (2) he would lease them, paying rentals adequate to pay the REA debt service until that debt should be full repaid, plus operating expenses; (3) he would sell electricity to the cooperatives, thus delivered to their load centers, at the "basic SPA rate."[5] The government was thus relieved, as Congress insisted, of the burden of appropriating money to construct these lines.

The cooperatives borrowed the money from REA to build them, in reliance on the Secretary's dual promise to pay or credit on their power bills the agreed rentals until the REA debt is fully paid, and to deliver electricity to the cooperatives over these lines at the system-wide "postage stamp rate" as though the government had built them with appropriated funds. The lines were built and put to use by the Secretary, as he had proposed.[6]

The 1950 Interior Department appropriations act added a substantive authorization for appropriations to pay the wheeling charges on these lines. It is now codified as 16 U.S.C. 825s-1.

A succession of Secretaries faithfully carried out these arrangements for over 20 years (from 1950 to 1970), and Congress repeatedly appropriated money to pay the stipulated rentals.

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[5] Congress established the Continuing Fund to implement the Secretary's plan. 97 CONG. REC. 7864-7868; 10207-10 (1951), 95 CONG. REC. 12023-36 (1949). Congress reiterated these directives in 1955. See pp. 18-19 *infra*.

[6] The annexed map, Attachment "A," shows these lines, expanded in 1962 at the Secretary's request. (R. Vol. II at 426-28)

In 1961 the Secretary expanded these arrangements, to the government's great advantage, as he reported to Congress.[7]

He proposed,[8] to the cooperatives and FPC, that the Missouri cooperatives, state-wide, federate as Associated Electric Cooperative, and enter into a contract with him which would enable SPA to sell all of its power as "peaking" power, accompanied by limited quantities of energy, instead of firm power as previously. To accomplish this, it was necessary that the government hydro generation be integrated into that of investor-owned thermal-powered systems having five or six times the generating capacity of the government's hydro plants. Associated's lines would be employed to do this.[9] The Secretary would contract to sell peaking power to three large investor-owned companies (the Missouri Companies), to be delivered over Associated's lines. In addition, Associated would borrow money from REA to extend its lines to enable interconnection between SPA and the government's Missouri Basin system, some 300 miles away from SPA. Associated would wheel power to six municipalities. It would

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[7] *Hearings on Public Works Appropriations for F.Y. 1963 Before a Subcomm. of the House Comm. on Appropriations*, 87th Cong., 2d Sess., pt. 3 at 815 (1962).

[8] R. Vol. I, 245-69.

[9] The Secretary proposed: "2. 161 KV Transmission Facilities. The Government would continue paying under the existing arrangements for the use of the capacity in the Central and N.W. 161 KV lines with no substantial modification from the present contractual rights and obligations of the parties." (Ex. P-22, R. Vol. II 427-28.)

furnish power from other sources to make good all transmission losses. Associated would furnish "standby" power, in case of failure of government generating facilities. SPA would continue to sell power to the cooperatives, delivered, at the basic SPA rate, as before, but this would be the basic SPA rate for peaking power, not firm power.

The government promised to pay Associated $2,647,100 annually for its transmission services,[10] in the form of credits against payments for power and energy at the basic SPA rate for peaking power. This amount included, as theretofore, the annual debt service to REA (enlarged to build the interconnections stipulated by SPA), and operating costs, and it provided reimbursement to Associated for the power and energy it furnished to replace transmission losses. The contract would obligate the Secretary specifically to continue to pay (credit) this amount annually until the REA debt is fully paid (1997).

The cooperatives accepted the Secretary's proposal.

Again we invite attention to the annexed map. It shows that Associated's transmission system, made available to SPA (the red line) is the only interconnection between the government's Bull Shoals and Table Rock Dams, between these dams and Stockton Dam, and between the whole SPA grid and the Bureau of Reclamation's Missouri Basin system.[11]

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[10] Payment of an additional $2,008,900 for providing standby and other services is not in dispute.

[11] The interconnection is at Maryville, in northern Missouri.

The Secretary reported the success of his plan to Congress,[12] and Congress repeatedly appropriated money from the Continuing Fund to carry it out.[13]

Because of the wheeling arrangements and advantages of integration gained through SPA's contracts with Associated, Congress did not have to appropriate funds for the construction of new government-owned lines for Missouri.[14] The only appropriations, based on the Secretary's representations, were for lines to "implement the Associated and Missouri Co.'s contracts."[15]

In 1970, however, a new Secretary, without notice or hearing, promulgated a new "Transmission Service Charge," applicable to Associated alone, in the amount of $2,647,100 annually. It happens, not by coincidence, that this is the precise amount that the Secretary's contract obligates him to pay Associated. It would thus accomplish indirectly what the Secretary concededly cannot do directly, cancel a valid obligation.[16]

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[12] *Hearings, House Comm. on Public Works Appropriations, F.Y. 1963*, 87th Cong., 2d Sess., pt. 3 at 815, 823-24 (1962).

[13] *E.g.*, Public Works Appropriations Act for F.Y. 1964, P.L. 88-251, U.S. CODE CONG. & AD. NEWS 591 (1963); Interior Department justification, in *Hearings of House Comm. on Appropriations on Public Works Appropriations for F.Y.* 1964, 88th Cong., 1st Sess., pt. 3 at 699-700 (1963).

[14] "Facilities owned and to be constructed by an REA generation and transmission cooperative, as well as now existing, make the proposed construction unnecessary at this time." S. REP. No. 1672, 89th Cong., 2d Sess. 39-40 (1966).

[15] *Hearings on the Interior Dep't Appropriations Bill for 1964 Before a Subcomm. of the Senate Comm. on Appropriations*, 88th Cong., 1st Sess., at 143 (1963).

[16] See note 1 *supra*. After entry of summary judgment in Associated's favor in the District Court, the Secretary imposed a small "transmission service charge" on one other customer, the small town of Hermann, Mo. (App. 18a, n. 19)

SPA's motivation was brazen and plain:

> "Administrator King feels that under present conditions all power presently marketed under the Associated contract could be sold without any service charges being paid by the Government, in which case SPA could save over $4.5 million annually. He intends to make every effort to eliminate them." (Ex. 32, R. Vol. II at 479.)

It is important to note that the Secretary, while calling this a "rate revision," did not in fact change at all the uniform system-wide P-2 rate for peaking power charged by SPA to all customers, including these cooperatives. The new charge is an increase in cost of power to the cooperatives alone, and it was designed to accomplish this very differential. The cost to the investor-owned power companies to which Associated was obligated to wheel SPA power was left untouched.[17]

The Federal Power Commission, without a hearing, approved the transmission charge "simultaneously," as it said, with denying Associated's petition to intervene.

Judge Hart of the district court, after hearing cross motions for summary judgment, granted that of plaintiff, and denied that of defendants and the United States, holding that:

> "1. The Transmission Service Charge imposed be defendants on plaintiff is not a rate revision authorized by Section 5 of the Flood Control Act of 1944 or other statute;

[17] These rates remain, system-wide, $14.40 per kilowatt year of capacity, 2 mills per kilowatt hour of energy, for "peaking" purposes. 1,200 kwh of energy is supplied for each kw of capacity.

> "2. Defendants are not authorized by law to unilaterally reduce the amounts contractually owed to plaintiff for its transmission services; and
>
> "3. Defendants' actions were arbitrary, capricious and in abuse of discretion." (App. 23a.)

The court of appeals reversed in all three respects, and remanded the case to the district court, for determination of the value of the services rendered by Associated, these values to be substituted for the contract amount.

Associated would have no basic objection to a judicial determination of the amounts that SPA should pay for Associated's transmission services, if this were the only issue, provided that this determination relates to all services rendered in integrating SPA's system with that of the utilities, and transmitting all power and energy to all consumers and between SPA and the government's Missouri Basin System, taking into account the debts incurred at SPA's request to build the facilities to supply the services that SPA contracted for.

But the crux of the decision is that Associated will be allowed to keep only that portion of the newly determined compensation which relates to its transmission of power to customers other than the cooperatives.[18] This cost will not be added to the power bills paid by these other customers (primarily the three large Missouri utilities); SPA will continue to absorb it. By

[18] The court noted that, of the government power transmitted by Associated, only 52% is transmitted to the cooperatives, 48% to private utilities, municipalities, and the government's Missouri Valley system. (App. 20a.)

contrast (and this is the rub), the portion of the payments which relates to transmission of government power to the cooperatives will be taken back, by adding this exact amount to their power bills as a transmission service charge. We are thus forced into a "no win" situation: whatever the district court determines the Secretary properly owes for transmitting power to the cooperatives will be taken back from them by a transmission service charge in the same amount. The court of appeals decision would permit the Secretary to disown SPA's obligation, undertaken at the direction of the Appropriations Committees, to pay the debt service on the REA loans which financed the lines made available to SPA in lieu of federal appropriations to construct them, and to deliver electricity to them at the "basic SPA rate," as though congressional construction appropriations had been required.

Beyond the inequitable result in this particular case, the court of appeals decision, if not corrected, will have far-reaching and bizarre consequences in the administration of the numerous federal power resources governed by the Flood Control Act of 1944 and sister "postage stamp rate" statutes, and particularly in the implementation of the congressional policy of minimizing the need for construction appropriations by insisting upon wheeling agreements.

Three of these consequences are identified below.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Unprecedented Decision Below, Finding Authority in the Secretary to Unilaterally Reduce, Without Compensation, the Government's Contractual Obligations To Pay for the "Wheeling" of Its Power Over Transmission Lines Owned by Others, Is Without Statutory Justification, and, Unless Reversed, Will Make Hazardous the Continued Utilization of This Congressionally Directed Alternative to Construction of Transmission Lines at Federal Expense.

The directives of Congress in this case (*infra* p. 18) accord with a fixed congressional policy to not only encourage, but require, the Secretary's use of contracts to wheel power over lines financed by utilities wherever possible, as a preferable alternative to appropriation of federal money to build transmission lines.[19]

Here, the new SPA Administrator had other ideas. He assumed (1) that, contrary to the hypothesis of Congress, it is more expensive to pay wheeling charges equal to debt service plus operating costs than it is for the government to construct and operate lines, and (2) that the Secretary can therefore recover not only the difference between the two, but the whole agreed wheeling charge, leaving the other party burdened with the debt incurred to build lines to provide the service that the Secretary requested and contracted to pay for.

Nowhere has Congress, or the Secretary's contract, reserved authority to unilaterally modify any provision of the contract other than the P-2 rate, and this he has left unchanged at $14.40 per kw year for capacity, 2 mills per kw for energy. (App. 26a.)

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[19] See note 4 *supra*.

The court of appeals conceded (App. 14a):

> "Were the relationship of SPA to Associated only that of a lessee to a lessor there would be merit in Associated's contention that the Secretary's action was violative of the contractual provisions, as well as ultra vires under applicable federal law."

But it goes on to say:

> "This, however, is not the case. The Secretary also sells power and energy to Associated. Section 5 of the Flood Control Act expressly provides that the rates imposed with respect to a sale of power must be adequate to recover the cost of both providing and transmitting the power. The imposition of the transmission service charge thus falls within the Secretary's rate-making authority." *Id.*

This, we respectfully submit, is a non sequitur of serious proportions. If the Secretary, in his capacity as lessee, could not unilaterally extinguish the agreed lease rentals (as he is doing by retaking them, dollar for dollar), he does not acquire that authority by contracting to sell power to his lessor.

The decision would establish the principle that the Secretary, in the administration of "wheeling" contracts by which government power is transmitted over the lines of power companies and public agencies, is authorized to unilaterally reduce (to zero, on the authority of this case) the compensation that he has agreed to pay for wheeling service, if the utility has trapped itself by also entering into a power purchase agreement with the Secretary. It would be a novel (and dangerous) principle of contract law if the mere offsetting of the government's debt in one transaction

for services rendered by the other party, against the government's right to receive revenues in another transaction with the same party, gives the administrative officer a power not otherwise existing to unilaterally revalue (and, as here, extinguish) the compensation that the government has agreed to pay.

The use of the net billing method, ordered by Congress in our case in 1955 (*infra* p. 19), is commonly used in government wheeling contracts with utilities which also purchase government power, as here. On the Bonneville project, a government spokesman told Congress:

> "The Administration proposes to settle accounts with its customers on a net-balance basis. Under the proposal, the non-Federal utilities would bill the Administration for wheeling power over their lines, and for exchange energy account balances; the Administration would bill the non-Federal utilities for power supplied, for exchange energy account balances, and the wheeling of power over the Administration's lines. The non-Federal utility or the Administration, as the case may be, would then remit to the other party the net balance in money due for the billing period." *Hearings on Public Works Appropriations for 1961 Before the Subcomm. on Appropriations,* 86th Cong., 2d Sess., pt. 2 at 577 (1960).

Until now, it has not been suggested that use of "net billing" gives the Secretary the authority he claims for his Southwestern Power Administration to unilaterally redetermine, indeed extinguish, the amounts he owes.

If he has such authority here, he has it everywhere. Of course he does not, anywhere, and the court of

appeals' conclusion to the contrary requires correction. Otherwise, no utility can safely enter into wheeling contracts with the United States that utilize net billing, and this reiterated policy of Congress is in peril.

II.

A Dangerous and Fallacious Precedent Is Set by the Holding that the Secretary of the Interior May Reverse a Congressional Policy Decision, Imposing Detailed Conditions on the Expenditure of Appropriated Funds. These Conditions Required the Secretary To Effectuate the Congressional "Postage Stamp Rate" Policy by Including in His Power Contracts Specific Provisions Which He Would Now Abrogate.

In 1955 Congress reconsidered and reiterated its mandate that the Secretary deliver power to the Missouri cooperatives over the lines now in question, at the SPA "postage stamp" rate. The occasion was the resumption of appropriations after their interruption for two years in consequence of litigation which unsuccessfully attacked the validity of the Secretary's contracts with the cooperatives.[20]

In reporting out appropriations to resume the payment of rentals, the House Appropriations Committee imposed conditions to accomplish three objectives:[21]

> "This action makes it possible *to reactivate valid and legal contracts* which certain G. and T. (Generating and Transmission) cooperatives have with SPA.* * * *

[20] Kansas City Power & Light Co. v. McKay, et al., 115 F.Supp. 402 (1953), *vacated for lack of standing*, 225 F.2d 924 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955). The district court opinion described the existing arrangements in detail.

[21] H.R. Rep. No. 747, 84th Cong., 1st Sess. 5-6 (1955). These "valid and legal contracts" specifically required the Secretary to continue to pay rentals until the REA debt is paid. The 1962 contract reconfirms this obligation. See note 1 *supra*.

> "In reactivating the contracts with the G. and T. cooperatives, *the Department of the Interior is instructed* to delete any provisions providing for the option to purchase G. and T. transmission lines or other facilities by the Southwestern Power Administration. The contracts are also to provide: (1) that the G. and T. cooperatives will operate and maintain their own transmission systems under lease to the SPA; (2) that the SPA and the G. and T. cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties; and (3) *that power and energy will be delivered to the load centers of all G. and T. contracting systems at the basic SPA rate.*" (Emphasis added.) (Ex. P-16, R. Vol. II, 418.)[22]

The "postage stamp rate" thus ordered had been fixed federal policy for a decade and a half.[23] Its

[22] The Conference Report on that same appropriation bill contained comparable language. H.R. Rep. No. 1085, 84th Cong., 1st Sess. (1955). (Ex. P-17, R. Vol. II, 419.)

[23] One of the earliest articulations of the "postage stamp rate" policy came in 1937 in a message to Congress by President Roosevelt, adopting and endorsing the report of his Committee on National Power Policy. He told Congress that federal rate schedules were to provide:

> ". . . for uniform rates or rates uniform throughout prescribed transmission areas with a view to distributing the benefits of an integrated transmission system and encouraging the equitable distribution of the electric energy developed." S. Doc. No. 21, 75th Cong., 1st Sess. 2-4 (1937).

This policy has been carried out on the TVA, Bonneville, Southeastern Power Administration, and Missouri Basin Systems, and, until now, on the SPA System.

essence is that rural customers at a distance from the government's power plants shall be charged no more than customers situated near the plants.

The court of appeals declined to give effect to the Committee's directives, enforced for 15 years.

On this issue, the court erred in several respects.

(1) It ignored the fact that the Secretary obeyed the congressional decision by incorporating the required changes *in haec verba* in amendatory contracts (R. Vol. II, at 63-64), which in turn were the subjects of appropriations for over a decade.

(2) An appropriations committee's report imposing conditions on the expenditure of appropriated funds, which are accepted and executed by the executive agency to which they are directed, is not simply an aid to legislative construction, as are committee reports generally; such directives have a special and controlling status. A record of continued appropriations "constitutes ratification of administrative construction, and confirmation and approval of the contracts." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 293 (1958); *Brooks* v. *Dewar,* 313 U.S. 354 (1941).

The court's opinion makes disturbing new law, in telling executive agencies that conditions imposed on use of funds in the reports of the appropriations committees have no binding effect, and can be reversed by an administrator, even after he has incorporated them, as the committees required here, in the contracts which make use of the funds so appropriated.[24]

[24] The court of appeals implies (App. 9a and n. 9) that Congress' lack of action with respect to the transmission service charge invalidates Associated's view of past committee action and appropriations. There was no reason for Congress to act, because appropriations are not required now because of the net balance billing method.

The court's answer is that there is nothing to show that the committees or Congress as a whole "had any intent to require as a matter of law that the Secretary sell power at less than cost contrary to the explicit directive of Section 5 of the Flood Control Act." (App. 13a.)

This misses the point. Even putting to one side the Secretary's fallacy, acknowledged by the court of appeals, in comparing receipts for 52% of the power with costs incurred in transmitting 100% of it, and disregarding Congress' reiterated hypothesis that renting transmission capacity is cheaper than appropriating construction funds, the point remains that if power is truly being sold at less than cost, the statutory remedy is an increase in the basic rate, to all customers. The remedy selected by the Secretary was to discriminate against customers served over leased lines by violating the statutory direction and the contractual promise that these lines shall be treated as part of the SPA system,[25] in consideration of their construction at the expense

[25] The Secretary's contracts specifically define the "System of SPA" as including not only the SPA government-owned grid, but the lines of Associated made "available to SPA" by the Associated-SPA contract. (R. Vol. II, at 326.) The transmission service charge discriminates against the cooperatives in two respects: (1) by drastically increasing (over 40%) the cost of electricity to the government's customers served via its transmission contract above the cost to those served via government-owned lines (even though, as Congress has consistently posited, the government's wheeling costs may be less than costs related to government construction and operation), and (2) by exempting the private companies and federal facilities to which government power is wheeled over these particular lines from the transmission service charge imposed on the cooperatives served over them. We equate the mandate in Section 5 of the 1944 Flood Control Act "for sale on fair and reasonable terms to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies" with sale on non-discriminatory terms and conditions.

of the customers, and that power delivered thereby shall be charged for at the basic SPA postage stamp rate.

The court's rationalization (App. 15a-16a) that the Secretary's unilateral change of delivery points from the contractual delivery points near load centers of the cooperatives (at Congress' direction) to points on the SPA grid, requiring the cooperatives to pay the old rate for delivery at the new points, is itself a rate revision, hence within his authority to revise rates. This novel interpretation of Section 5 of the 1944 Flood Control Act, without support in the legislative history, or 26 years of administrative construction, proves too much. It would as logically apply to changes in the contracts of customers who take power from points on the SPA grid as to customers served over leased lines, as in this case.

If the court of appeals is right, the Secretary could tomorrow, without hearing, change all deliveries from contractual points on the SPA grid itself to the bus bars of the power plants, adding a transmission service charge to deliver power to the contractual points on the SPA grid from these new and arbitrary delivery points. By the same token, on the Bonneville, Missouri Valley, and TVA projects, where power is delivered at points on the government-owned transmission grid, the administrator could unilaterally change these delivery points to the bus bars of the power plants, charge the old rate at the new points, and add a transmission service charge to deliver power to the contract points—if the new law established by the court of appeals in our case is not corrected.

The Secretary has no such power to reverse Congress' "postage stamp rate" policy.

III.

The Decision Below Denies that the Secretary of the Interior and the Federal Power Commission Are Under a Constitutional Duty To Afford Due Process to Parties to Government Contracts Whose Rights They Would Reduce or Cancel. If Due Process Is Required in Such Cases, to Any Degree, the Decision of the Court of Appeals Must Be Reversed, Because the Secretary and the Commission Did Not Grant Any at All, and Denied Their Responsibility To Do So.

The Secretary lacked authority to take back the compensation that he admittedly [26] owes for the use of the cooperatives' lines, and he cannot do by indirection what he cannot lawfully do directly. The due process question, therefore, is one of substantive, not merely procedural, due process. He has taken property without compensation. *See United States* v. *Northern Pac. Ry. Co.*, 256 U.S. 51 (1921); *Lynch* v. *United States*, 292 U.S. 571 (1934). This Court long ago held that where the federal government induces another party to construct facilities for its benefit in return for a promised consideration, the government is bound by a contractual obligation, *Burke* v. *Southern Pac. R.R. Co.*, 234 U.S. 669, 679-80 (1914), and rights thereunder are entitled to due process protection. *United States* v. *Northern Pacific Ry. Co.*, 256 U.S. 51, 64 (1921). Three weeks of elaborate hearings could not have infused any validity into his actions.

The district court held, we think properly, that the Transmission Service Charge was not a rate revision at all. But, if the court of appeals' contrary premise is assumed, disturbing consequences follow as to the procedural due process required in the exercise of the

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[26] Defendants' answer, quoted note 1 *supra*.

Secretary's rate-making powers.[27] This case is the first in which a court of appeals has considered that subject.

The court of appeals, treating the question as one of procedural due process, held that the Secretary was not obliged to give the other party to the contract notice, hearing, or even opportunity to comment, before changing its terms. No record, no findings, were made. See *FPC* v. *Texaco*, 417 U.S. 380 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962). The court nevertheless felt that, because the Secretary did not act in a vacuum, but had secret reports from his staff, his action is to be sustained (App. 18a). The court even took into account, in reaching that conclusion, ex post facto affidavits by staff members, submitted to the district court in its hearing on the motions for summary judgment, as to what they thought they told the Secretary, in private. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Burlington Truck Lines*, *supra*. The Secretary gave Associated no opportunity to probe his staff's rationale. The Federal Power Commission was just as arbitrary. It held no hearings,[28] exercised no independent exper-

[27] The court of appeals' opinion, unless corrected, will control review of the Secretary's rate-making functions not only under the Flood Control Act of 1944, but under the Bonneville Project Act, 16 U.S.C.A. 838g, the Fort Peck Act, 16 U.S.C. 833, and the Reclamation Project Act of 1939, 43 U.S.C. 485h(e), which all contain cognate provisions on this subject. A district court in this Circuit has held the Secretary to much stricter account in his rate-making on the Central Valley Project under a similar statute. Northern California Power Agency, et al. v. Morton, et al., C.A. No. 74-617 (D.D.C. Feb. 14, 1975).

[28] Yet the Commission has itself acknowledged the necessity for hearings on the Secretary's proposal to increase rates on the Bonneville power system. United States Dep't of the Interior, Bonneville Power Administration, Docket No. E-8978, — F.P.C. — (Dec. 19, 1974).

tise, denied Associated permission to intervene, "simultaneously," as it said, with approving the Secretary's action. It relied on in-house exchanges, via telephone and letter, with the Secretary's staff.

But the court of appeals saw nothing wrong.

This is disturbing law to create in the Circuit which hears the great bulk of petitions to review actions of administrative agencies.

CONCLUSION

We ask that the Court grant certiorari, because of the importance of the issues in this case to the sound administration of the many federal power projects which are controlled by Section 5 of the Flood Control Act of 1944, and, by extension, those projects which are controlled by other members of the same family of federal power statutes administered by the Secretary of the Interior.

These questions have not been, but should be, decided by this Court.

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ATTACHMENT "A"

(Ex. P-15, R. Vol. II at 417)